

**Vijendran a/l Ponniah v
Bank of Commerce**

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HIGH COURT (KUALA LUMPUR) — SUIT NO S-5-23-15 OF 1996
JAMES FOONG J
31 JULY 1998

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Bankruptcy — Practice and procedure — Malicious institution of bankruptcy — Negotiations pending — Plaintiff paid money into court — Defendant initiated bankruptcy proceedings — Essential issues for determination — Whether proved

Tort — Abuse of process — Whether party who has initiated proceedings had done so for purpose beyond that which legal process offers — Whether collateral purpose apart from intention to recover loan from plaintiff

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The plaintiff was a customer of the defendants. The plaintiff's overdraft facility was recalled by the defendant and a demand of RM19,865.42 was made against the plaintiff. The defendants filed a civil action in the magistrate's court claiming the sum demanded together with interest and cost. The plaintiff entered appearance but did not file the defence on the ground that he was negotiating with the defendant to settle the case. The defendant denied this. The defendants also denied that there was a settlement to pay the sum by installment. A judgment in default of defence was obtained against the plaintiff. The plaintiff's application to set aside the default judgment was dismissed. The plaintiff had obtained leave to file an appeal to the Court of Appeal. Pursuant to the default judgment, the defendant sent to the plaintiff a letter demanding the plaintiff to pay a sum of RM25,554 which included interest and cost, failing which bankruptcy proceeding would commence. Upon receiving the letter, the plaintiff paid RM19,865.42 which was rejected by the defendants. The defendants then commenced bankruptcy proceedings against the plaintiff by securing a bankruptcy notice. Instead of applying to the High Court to set aside the bankruptcy notice, the plaintiff obtained a stay of execution order on the default judgment upon the condition that the plaintiff pay into court the sum of RM21,374.70. Without informing the defendants, the plaintiff paid the sum into court. The defendants only became aware of this after the bankruptcy notice had been served on the plaintiff. In the meantime, the defendants had obtained leave to withdraw the sum paid in by the plaintiff. Against this backdrop, the plaintiff brought an action against the defendants for malicious prosecution and abuse of process and claim for damages allegedly suffered.

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Held, dismissing the claim:

- (1) Since there was no criminal charge ever set in motion, the plaintiff was more set in basing his action under malicious institution of bankruptcy. Essential for determination in the cause of action for malicious institution of bankruptcy was whether the bankruptcy

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- A** proceedings had terminated in favour of the plaintiff. The bankruptcy proceedings was not proceeded further than the bankruptcy notice and subsequent to the order of stay of execution, the defendants proceeded no further. There was never any petition for bankruptcy filed against the plaintiff. For this, there was never any determination by the bankruptcy court in favour of the plaintiff (see pp 424I, 425H, 426A).
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- C** (2) The taking of money out from the court by the defendants was connected with the default judgment process and not directly associated with the bankruptcy proceedings. In such an event, the bankruptcy process could not be considered as being terminated in favour of the plaintiff. If there is any termination in favour of the plaintiff, the bankruptcy process must be litigated or if ever a petition for bankruptcy was filed, the dismissal thereof. None of these ever happened (see p 426D–E).
- D** (3) Central to the tort of abuse of process is the requirement that the party who has initiated proceedings had done so for a purpose beyond that which the legal process offers. In the present case, when the plaintiff failed to satisfy the defendants' demand for repayment of the loan, the defendants had every right to institute legal action to recover the same. Their action was a genuine redress which the process offered (see p 427B, H).
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- F** (4) Under the legal process, when defence is not filed, the party bringing the action has the right to enter judgment in default. The aggrieved party can apply to set it aside if the court can be convinced there was indeed an arrangement to settle. In the present case, the defendants denied any settlement reached. The magistrate's court and the High Court had decided on this issue which was against the plaintiff. On record, the plaintiff had not been able to prove that there was a negotiation pending to succeed in his application to set aside the default judgment. This being the case, the court found no other purpose in bringing the action except the desire of the defendants to recover their loan to the plaintiff (see p 428A–B).
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- H** (5) Similarly with regard to the institution of the bankruptcy proceedings, the court found that there were no collateral purposes beyond that the legal process offers as claimed by the plaintiff. A judgment stands as a good judgment until set aside. When a judgment sum was not paid, then execution could be enforced. This could take the form of a bankruptcy proceeding, as was the case here. The court could not see any sinister reason for this approach taken by the defendants (see p 430E).

I [Bahasa Malaysia summary]

Plaintif adalah pelanggan defendan-defendan. Kemudahan overdraf plaintiff telah ditarik balik oleh defendan dan satu tuntutan sebanyak

RM19,865.42 telah dibuat terhadap plaintiff. Defendan-defendan telah memfailkan satu tindakan sivil di dalam mahkamah majistret menuntut jumlah yang dituntut dengan faedah dan kos. Plaintiff telah memasukkan kehadiran tetapi tidak memfailkan pembelaan atas alasan bahawa beliau sedang berunding dengan defendan untuk menyelesaikan kes tersebut. Defendan menafikan perkara ini. Defendan juga menafikan bahawa terdapat persetujuan untuk membayar jumlah itu secara ansuran. Satu penghakiman ingkar kerana gagal mengemukakan pembelaan telah diperolehi terhadap plaintiff. Permohonan plaintiff untuk mengketepikan penghakiman ingkar telah ditolak. Plaintiff telah mendapatkan kebenaran untuk memfailkan suatu rayuan ke Mahkamah Rayuan. Selaras dengan penghakiman ingkar tersebut, defendan telah mengirimkan kepada plaintiff sepucuk surat menuntut plaintiff membayar jumlah sebanyak RM25,554 yang termasuk faedah dan kos, kegagalan yang mana akan menyebabkan prosiding-prosiding kebangkrupan dimulakan. Setelah menerima surat tersebut, plaintiff telah membayar RM19,865.42 yang mana telah ditolak oleh defendan-defendan. Defendan-defendan kemudiannya telah memulakan prosiding-prosiding kebangkrupan terhadap plaintiff dengan mendapatkan notis kebangkrupan. Daripada memohon kepada Mahkamah Tinggi untuk mengketepikan notis kebangkrupan tersebut, plaintiff telah memperolehi perintah penggantungan pelaksanaan ke atas penghakiman ingkar di atas syarat bahawa plaintiff membayar ke dalam mahkamah jumlah sebanyak RM21,374.70. Tanpa memberitahu defendan-defendan, plaintiff telah membayar jumlah itu ke dalam mahkamah. Defendan-defendan hanya mengetahui mengenai perkara ini selepas notis kebangkrupan disampaikan ke atas plaintiff. Sementara itu, defendan-defendan telah mendapatkan kebenaran untuk mengeluarkan jumlah yang telah dibayar ke dalam mahkamah oleh plaintiff. Berdasarkan latar belakang ini, plaintiff telah memulakan tindakan terhadap defendan-defendan atas dakwaan niat jahat dan penyalahgunaan proses serta menuntut untuk ganti rugi yang dikatakan telah dialami.

Diputuskan, menolak tuntutan:

- (1) Oleh kerana tidak terdapat sebarang tuduhan jenayah yang pernah dimulakan, plaintiff lebih berdasarkan tindakannya di bawah tindakan permulaan kebangkrupan dengan niat jahat. Perkara penting untuk penentuan kausa tindakan bagi tindakan permulaan kebangkrupan dengan niat jahat adalah sama ada prosiding-prosiding kebangkrupan tersebut telah ditamatkan dengan memihak kepada plaintiff. Prosiding-prosiding kebangkrupan tersebut tidak diteruskan selanjutnya iaitu setakat notis kebangkrupan sahaja dan berikutan dengan perintah penggantungan perlaksanaan, defendan-defendan tidak meneruskannya selanjutnya. Tidak pernah terdapat sebarang petisyen untuk kebangkrupan yang difailkan terhadap plaintiff. Berhubung dengan perkara ini, tidak pernah terdapat sebarang

- A** penentuan oleh mahkamah kebangkrutan yang memihak kepada plaintif (lihat ms 424I, 425H, 426A).
- (2) Pengambilan wang keluar daripada mahkamah oleh defendan-defendan adalah dikaitkan dengan proses penghakiman ingkar dan tidak secara langsung dikaitkan dengan prosiding-prosiding kebangkrutan. Dalam keadaan yang sedemikian, proses kebangkrutan tersebut tidak boleh dianggap sebagai telah ditamatkan dengan memihak kepada plaintif. Jika terdapat sebarang penamatan yang memihak kepada plaintif, proses kebangkrutan tersebut mestilah dilitigasikan atau jika suatu petisyen kebangkrutan pernah difailkan, ia haruslah ditolak.
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- C** Tidak satu pun daripada perkara ini pernah berlaku (lihat ms 426D-E).
- (3) Yang utama kepada tort penyalahgunaan proses adalah syarat bahawa pihak yang telah memulakan prosiding-prosiding telah melakukan sedemikian bagi suatu tujuan yang di luar apa yang ditawarkan oleh proses undang-undang. Dalam kes ini, apabila plaintif gagal memenuhi tuntutan defendan-defendan untuk pembayaran balik hutang tersebut, defendan-defendan mempunyai segala hak untuk memulakan tindakan undang-undang untuk memperolehinya semula. Tindakan mereka merupakan satu tindakan tebus-rugi yang tulen yang mana ditawarkan oleh proses tersebut (lihat ms 427B, H).
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- (4) Di bawah proses undang-undang, apabila pembelaan tidak difailkan, pihak yang memulakan tindakan tersebut berhak untuk memasukkan penghakiman ingkar. Pihak yang terkilang berhak untuk memohon untuk mengketepikannya jika mahkamah boleh dipengaruhi bahawa sesungguhnya terdapat satu persetujuan untuk menyelesaikannya. Dalam kes ini, defendan-defendan menafikan sebarang penyelesaian yang dicapai. Mahkamah majistret dan Mahkamah Tinggi telah memutuskan isu ini yang tidak berpihak terhadap plaintif. Menurut rekod plaintif, tidak dapat dibuktikan bahawa terdapat perundingan terdahulu untuk menjayakan permohonannya untuk mengketepikan penghakiman ingkar tersebut. Oleh kerana itu, mahkamah mendapati tidak terdapat apa-apa tujuan lain dalam memulakan tindakan tersebut melainkan keinginan defendan-defendan untuk memperolehi semula pinjaman mereka daripada plaintif (lihat ms 428A-B).
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- H** (5) Begitu juga, berhubung dengan permulaan prosiding-prosiding kebangkrutan, mahkamah mendapati bahawa tidak terdapat tujuan-tujuan kolateral yang melebihi apa yang ditawarkan oleh proses undang-undang sepertimana yang didakwa oleh plaintif. Suatu penghakiman boleh dianggapkan sebagai suatu penghakiman yang baik sehingga ia diketepikan. Apabila sesuatu jumlah penghakiman tidak dibayar, maka pelaksanaan boleh dikuatkuasakan. Ini mungkin boleh dilaksanakan dalam bentuk prosiding-prosiding kebangkrutan, sepertimana kes ini.
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Mahkamah tidak dapat melihat sebarang alasan yang mencurigakan bagi pendekatan yang diambil oleh defendan-defendan ini (lihat ms 430E).]

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Notes

For cases on practice and procedure in bankruptcy matters generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1924–1961.

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Cases referred to

Hernman v Smith [1938] AC 305 (refd)

Hicks v Faulkner (1878) 8 QBD 167 (refd)

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Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425 (refd)

Mitchell v Jenkins (1833) 5B & Ad 588 (refd)

Quartz Hill Consolidated Gold Mining Co, The v Eyre (1883) 11 QBD 674 (refd)

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Williams v Spautz 107 ALR 635 (refd)

A Murali (Vijendran & Co) for the plaintiff.

Ponmugam (Ponmugam & Co) for the defendant.

James Foong J:

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The plaintiff's claim

The plaintiff's cause of action against the defendants is:

- (a) malicious prosecution; and
- (b) abuse of process.

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He claims to have suffered damages as a result.

The chronology of events

In order to understand this claim, it is necessary for me, at the outset, to set out the chronology of events.

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The plaintiff is an advocate and solicitor practising under the name and style of M/s Vije & Co at the material time. He was a customer of the defendants, who are and were at the material time bankers. There were two banking accounts operated by the plaintiff: a personal account and an office account. In 1983, the plaintiff enjoyed a clean overdraft facility of up to RM20,000 on his personal account. However in 1989, the defendants insisted that he should apply for a secured loan to this account. Angered by this request, he forwarded to the defendants an application form for such a loan without much particulars, and his clerk as a guarantor. This was rejected by the defendants who then recalled the clean overdraft facility. A demand was then made by the defendants on the plaintiff for RM19,865.42. The plaintiff attempted to settle this by installments but the defendants claim that this was rejected though the plaintiff insists otherwise.

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A For these harsh and arbitrary actions, the plaintiff complained to the defendants' higher-ups of the actions of one Kenneth Pillay, the defendants' manager managing the plaintiff's account at that time.

B On 20 October 1989, the defendants filed a civil action in the magistrate court claiming the sum demanded together with interest and costs. When the summons was served, the plaintiff entered appearance. The plaintiff then contends that he was negotiating with the defendants' solicitors to settle this case; thus no defence was filed, but contrary to what was agreed, the defendants' solicitors obtained judgment in default of defence ('the default judgment') against him on 16 April 1990. The defendants deny this.

C The plaintiff immediately applied to set aside the default judgment. While his application was pending, the plaintiff alleges that his counsel, who is also his brother, has entered into settlement with the defendants' solicitor, one Ms. Kuna. This was to pay up the sum of RM19,865.42 by six installments commencing from 15 February 1991. According to the plaintiff this was agreed to by the defendants. However this again is denied by the defendants.

D Though insisting that there was a settlement concluded, the plaintiff did not comply with the terms to pay within the purported agreed time. One year after the default judgment, the defendants sent to the plaintiff a letter of demand for a sum of RM25,554, which included interest and costs calculated to the date of the letter. Also inserted in this letter is a paragraph which advised that if no payment is received bankruptcy proceedings will commence.

E Upon receipt of this letter on 29 April 1991, the plaintiff claims that he panicked, frightened and afraid of the impending bankruptcy proceedings which may affect his reputation. Despite such emotional reactions, the plaintiff only paid RM19,865.42 instead of the total sum so demanded in the said letter. This payment by way of a cheque was however returned to the plaintiff by the defendants' solicitors as being unacceptable.

F In the meantime, the plaintiff's application to set aside the default judgment was dismissed by the magistrate on 12 March 1991. Against this, the plaintiff filed an appeal to the High Court.

G On 17 May 1991, the defendants commenced bankruptcy proceedings against the plaintiff by securing a bankruptcy notice. Unable to serve the bankruptcy notice personally on the plaintiff, the defendants' solicitors on 29 May 1991 sent a letter of appointment to the plaintiff to serve this notice on the plaintiff personally, and if they fail to succeed, an application for substituted service by way of advertisement in seven named national newspapers was contemplated.

H The plaintiff, realising the urgency of this matter, applied to the session court to set aside the bankruptcy notice. This was dismissed for want of jurisdiction. Instead of applying to the High Court to set aside the bankruptcy notice, the plaintiff obtained an ex parte order for stay of execution on the default judgment. This interim order was granted on 24 July 1991 and was to last till 5 September 1991 where the inter parte

application of the plaintiff to stay execution will be heard. While this interim order was in force, the defendants on 10 August 1991, renewed the validity of the bankruptcy notice which had expired.

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On 5 September 1991, the plaintiff's application for stay of the default judgment was argued inter-parte before the High Court judge who then granted a stay of execution order on the default judgment on the following conditions:

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- (1) that the plaintiff pay into court the sum of RM21,374.70 and thereafter;
- (2) until the application for the setting aside of the default judgment is decided.

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Without informing the defendants, the plaintiff on 7 October 1991 paid into court a sum of RM21,374.70. The defendants became aware of this on 29 November 1991. By this time, the defendants had on 22 October 1991 served the bankruptcy notice on the plaintiff.

In the meantime, the plaintiff's appeal against the decision of the magistrate refusing to set aside the default judgment was dismissed by the High Court on 25 February 1995. Still dissatisfied, the plaintiff obtained leave from the Court of Appeal to file an appeal against the High Court decision. In the meantime, the defendants have obtained leave from the court to withdraw the sum of RM21,374.70 paid in by the plaintiff. As for the bankruptcy proceedings, no further action was taken by the defendants thereafter.

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Against this backdrop, the plaintiff is attempting to prove his two causes of action.

Causes of action, principles and analysis

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As the plaintiff has submitted that he is relying on the causes of action of malicious prosecution and an abuse of process to justify his claim, I shall now consider each of them separately, beginning with malicious prosecution followed by the abuse of process.

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Malicious prosecution

Definition

In para 1340 of 45 *Halsbury's Laws of England* (4th Ed), malicious prosecution is defined as:

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an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause, must have been instituted or carried on maliciously and must have terminated in the plaintiff's favour. The plaintiff must also prove damage.

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But from the facts of this case, since there is no criminal charge ever set in motion, I think that the plaintiff is more set in basing his action under

- A** malicious institution of bankruptcy. This, according to 45 *Halsbury's Laws of England* (4th Ed) para 1372 is elaborated as:

An action lies in respect of injury to reputation caused by maliciously and without reasonable and probable cause commencing bankruptcy proceedings against an individual or winding up proceedings against the company provided that the proceedings terminated favourably to the plaintiffs.

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Legal principles

Here, the necessary elements to prove such action are:

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- (1) The bankruptcy or winding up proceedings has commenced and terminated in favour of the plaintiffs.
 - (2) There is malice.
 - (3) There is an absence of reasonable and probable cause.
 - (4) There must be damages suffered.

- D** For the last ingredient, the Court of Appeal of England in *The Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 declared that injury to 'a man's fair fame and credit' brought about by the defendants' action against the plaintiff for bankruptcy or winding up is sufficient damage in a claim of this nature.

- E** As for what is reasonable and probable cause, the House of Lords in *Herrman v Smith* [1938] AC 305 has adopted Hawkins J definition pronounced in *Hicks v Faulkner* (1878) 8 QBD 167 at p 171 which is as follows:

- F** An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Then in respect of malice Parke B in *Mitchell v Jenkins* (1833) 5 B & Ad 588 at p 598 is of the view that:

- G** The term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but *malus animus*, and as denoting that the party is actuated by improper and indirect motives.

Analysis

- H** Bankruptcy proceedings in this case was commenced by the defendants against the plaintiff. The defendants assert that this was based on the plaintiff's failure to satisfy the judgment sum in the default judgment. But essential for determination in this cause of action for malicious institution of bankruptcy in the present situation is whether the bankruptcy proceedings has terminated in favour of the plaintiff. The plaintiff argued that it has when the orders for the stay of execution was granted, especially that dated 5 September 1991. This was then followed by the plaintiff's claim that the sum of RM21,374.40 so deposited by him under this stay
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order was taken out by the defendants. The defendants dispute this. They claim that the bankruptcy proceedings was not proceeded further than the bankruptcy notice, and subsequent to the inter-parte order of stay of execution was granted, they proceeded no further; there was never any petition for bankruptcy filed against the plaintiff. For this, there was never any determination by the bankruptcy court in favour of the plaintiff.

I agree with the views of the defendants. Bankruptcy proceedings is under the jurisdiction of the bankruptcy court, of which the High Court carries out its functions. When the bankruptcy notice was obtained by the defendants, the plaintiff attempted to strike it out. Instead of applying to the High Court, the plaintiff applied to the subordinate court. Inevitably he failed for want of jurisdiction. He never approached the bankruptcy court again. Instead he applied to the High Court to stay execution on the default judgment. Indirectly, when this application of his was granted, proceedings in the bankruptcy court should be stayed. Though stayed it was never ever litigated upon. And when no petition for bankruptcy was taken out with the lapse of the validity of the bankruptcy notice, this process was terminated by effluence of time. As for taking of money out from the court by the plaintiff, it is connected with the default judgment process and not directly associated with bankruptcy proceedings. In such an event the bankruptcy process cannot be considered as being terminated in favour of the plaintiff. If there is any termination in favour of the plaintiff, the bankruptcy process must be litigated, which in the circumstances of this case should be during an application to set aside the bankruptcy notice, or if ever a petition for bankruptcy was filed, the dismissal thereof. None of these ever happened. By these reasons, I find that the plaintiff has failed to satisfy this court of the first element to succeed in an action for malicious bankruptcy.

As for the other elements, I do not intend to proceed to analyse them here, except to say that for malice and absence of reasonable and probable cause factors I also find these not being proved. These are based on my detailed consideration of all material allegations of the plaintiff under the cause of action for abuse of process.

Abuse of civil process

Ingredients

Abuse of civil process is an actionable tort. In Malaysia, this has recently been confirmed in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425. For such an action to succeed, Gopal Sri Ram JCA at p 438 sets out the three essential elements to be fulfilled:

- (1) The process complained of must have been initiated;
- (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

A (3) The plaintiff must have suffered same damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort.

B The quintessential of this cause of action is found in the quoted passage of the Australian High Court decision of *Williams v Spautz* 107 ALR 635 accepted in the judgment of *Malaysia Building Society Bhd* at pp 436–438 case which is:

Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers

C It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed (*Re Majory* [1955] Ch 600 at 623–624) or some collateral advantage beyond what the law offers (*Goldsmith v Sperrings Ltd* [1977] 1 WLR at pp 498–499; see also *Varawa* (1911) 13 CLR 91)...

D Analysis

E In determining whether the plaintiff can succeed under this cause of action I discovered that by the nature of the plaintiff's claim and the testimonies adduced to support it, there are basically two legal processes instituted by the defendants; the first being the civil action in the magistrate's court leading to the default judgment; and the second is the institution of the bankruptcy proceedings. I shall initially deal with the former followed by the latter.

Legal action in the magistrate's court

F Indeed, the defendants have commenced an action in the magistrate court to recover the sum of RM19,865.42 together with interest and costs. But, did they do this for some other purpose other than to obtain genuine redress which the process offers? To determine this, I shall proceed to examine the material allegations of the plaintiff that the defendants did not.

G The first is the plaintiff's claim that the defendants' manager, one Kenneth Pillay was angry with him and wished to retaliate by filing this action because of the plaintiff's complaint to Pillay's superior over the withdrawal of the plaintiff's overdraft facility. I certainly do not find any merits in this assertion. The overdraft facility granted to the plaintiff's personal account was of a temporary nature. It could be withdrawn and the defendants did exactly this. And when the plaintiff failed to satisfy the defendants' demand for repayment of this loan, the defendants have every right to institute legal action to recover the same. This they did, and their action was a genuine redress which the process offered. I cannot find any other purpose besides this.

I The next claim of the plaintiff is that the default judgment should not have been obtained by the defendants when there was a negotiation for settlement. I find this difficult to comprehend. Under the legal process,

when defence is not filed, the party bringing the action has the right to enter judgment in default. The aggrieved party can apply to set it aside if the court can be convinced there was indeed an arrangement to settle. In this case, the defendants denied any settlement reached. Two courts of law (the magistrate court and the High Court) had decided on this issue which is against the plaintiff. I do not intend to join in to alter the numbers particularly when the appeal to the Court of Appeal on this matter is pending except to say that on record, as of today, the plaintiff has not been able to prove that there was a negotiation pending to succeed in his application to set aside the default judgment. This being the case, I can see no other purpose in bringing this action except the desire of the defendants to recover their loan to the plaintiff.

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The initiation of the bankruptcy proceedings

The plaintiff insists that the defendants had agreed to allow him to pay a sum of RM19,865.42 by six installments, the first to commence on 8 February 1989 after the default judgment was obtained. He paid this sum by way of a cheque on 29 April 1991, the day he received a threatening letter from the defendants that bankruptcy proceedings will be instituted if the judgment sum is not settled. Despite this, the defendants returned this cheque and proceeded to institute bankruptcy proceedings. For this, the plaintiff insists that there was a collateral purpose to damage his reputation. To support this contention of an agreement having been reached, the plaintiff desired to tender a letter written by him to the defendants' solicitors. It is marked 'without prejudice'. The defendants objected to its admissibility. I had it marked as ID ('ID1') for identification and announced that I will give my decision at the end of trial.

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After perusing this letter and considering the arguments of both parties, I am rejecting the admissibility of this document as an exhibit. The following are my reasons:

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(1) I do not accept the plaintiff's explanation that the term 'without prejudice' was loosely inserted on this document. The plaintiff is not a layman. He is and was at the material time of writing this letter a qualified advocate and solicitor of considerable number of years standing. Surely, he was aware of the full implication of this phrase when used.

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(2) At the lower part of this letter there is written: 'acknowledged without prejudice on 7 February 91 at 10.10 am.' and signed by the defendants' solicitors. This indicates 'that the defendants have to confirm the contents therein. There is yet to be a common consensus reached to imply acceptance of what is arbitrary uttered in the letter.

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The plaintiff's second witness PW2, (his brother) testified that he was the plaintiff's counsel in the setting aside of the default judgment's application, and that in the course of doing so, he had negotiated with one Ms Kuna to settle this case in accordance with the terms listed in ID1. He then affirmed that Ms Kuna agreed to this. Ms Kuna was called and she denied such

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- A** settlement. I believe her testimony. If the matter was ever settled in accordance with those alleged terms, why did the plaintiff not pay any of the installments agreed upon according to the time stipulated? It was only when the defendants wrote a letter of demand for the judgment sum to be paid that the plaintiff started to respond. And even when he tried to pay this sum
- B** on 29 April 1995, there was no mention of the settlement and that the amount tendered was in payment thereof. Instead, the plaintiff talked about the difference between RM19,865.42 and the judgment sum to be settled depending on the appeal of the application to set aside the default judgment. This gives no indication of any prior settlement having been reached. If there had been such an arrangement, the plaintiff would just pay
- C** RM19,865.42 without any need to refer to the balance, since there was none.

The plaintiff's next allegation relates to the mode and manner of the service and renewal of the bankruptcy notice affected on him. By such actions of the defendants, he claims the existence of a collateral purpose beyond that the legal process offers.

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- The first concerns a letter written by the defendants' solicitors on 29 May 1991 to the plaintiff informing the plaintiff of a date of appointment to serve the bankruptcy notice. In the last paragraph of this letter, the defendants' solicitors advised that if this notice is not served, then service will be affected through a number of newspapers, totalling seven, so named
- E** therein. This, the plaintiff claims was an extortion.

- I cannot agree with this view of the plaintiff. A bankruptcy notice needs to be served personally on the person so named in the notice. When personal service fails, application by way of substituted service is permitted by the rules of court. Before one can proceed with this approach, a letter of
- F** appointment is required to be sent to the person which service is intended. It is not unusual in such a letter of appointment to advise on the compliance of the appointment to avoid the embarrassment of a substituted service which can take the form of publication in newspapers. This is not a threat, but a fact that can materialize. As to the number of newspapers, the defendants named seven, but this is left to the court granting such
- G** application for substituted service to decide on the number in accordance with the law. I do not feel that naming of the seven newspapers for the considered substitute service was an extortion. The objective of the defendants' solicitors were to effect personal service and they strongly advised the plaintiff to meet the appointment. To discourage the plaintiff from negating the appointment they let known the consequences. The
- H** number of newspapers is immaterial but the right to advertise in a daily is permissible by law. This cannot be considered as a purpose to compel the plaintiff to settle the judgment sum lawfully due to the defendants under the default judgment.

- I** The next assertion of the plaintiff is that the defendants' process server, in attempting to serve the bankruptcy notice on him, has 'parked himself at the corridors of my (his) office to serve the notice on me (him)' and had walked in and out of his office to embarrass his staff and clients. In my

opinion, even if these allegations were true, it could have been easily avoided if the plaintiff had accepted service personally. Though the plaintiff insists that he was not avoiding service, the events recorded by documentary evidence speak otherwise. In fact, the plaintiff himself has admitted that he did not wish to satisfy the sum claimed in the bankruptcy notice for fear that this would jeopardize his application to set aside the default judgment. With such attitude, obviously he was trying to evade service, and when this happens, no blame can be attributed to process server in waiting for him outside his office to serve the process on him. As for the claim that the process server was in and out of his office, again, I reiterate that the process server had a right to carry out his job by visiting the office of the plaintiff to ascertain whether the plaintiff was there to receive the bankruptcy notice. This is not unlawful and cannot be considered as an implication of the existence of some other purpose other than that legally designed for.

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The third accusation of the plaintiff is on the commencement of the bankruptcy proceedings itself. According to him, this move was employed by the defendants to defeat his application to set aside the default judgment. If the sum as claimed in the bankruptcy proceedings was paid then his application to set aside the default judgment when successful would be nugatory.

D

I am surprised with this claim. The plaintiff speaks as if the default judgment will certainly be set aside. As revealed by both the magistrate court and the High Court decisions, it was the reverse. In any event, a judgment stands as a good judgment until set aside. When a judgment sum is not paid then execution can be enforced. This can take the form of a bankruptcy proceeding, as is the case here. I see no sinister reason for this approach adopted by the defendants.

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Continuing, the plaintiff next laments on the defendants' renewal of the validity of the bankruptcy notice on 10 August 1991 when the interim stay of execution order was granted on 24 July 1991. I agree that this may be a breach of the interim stay order but I cannot accept that this was done with the purpose other than to obtain a genuine redress which the process offers. The redress in this circumstances is the bankruptcy proceedings. This was commenced even before the interim stay order was obtained. Since I have thus far considered the commencement of the bankruptcy proceedings was not designed for some collateral advantage beyond what the law offers, the renewal of the bankruptcy notice must be considered as continuation of the purpose originally designed; it was what the law offers as a genuine redress.

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The final complaint of the plaintiff points towards the attempted service and finally the successful service of the bankruptcy notice on the plaintiff after the inter parte stay of execution order was granted on 5 September 1991.

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It must be noted that though the bankruptcy notice was renewed, there is no evidence of attempted service of this notice from date of renewal on the plaintiff until after the 5 September 1991. The defendants pointed out that they can resume service because this stay order of 5 September 1991 was on condition upon the plaintiff paying into court a sum of

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A RM21,374.70. When they attempted service of bankruptcy process on the plaintiff and the final service of it on him, they were not aware that the plaintiff had paid the money into court to effectuate the stay order.

I do not view the defendants' action of the service of the bankruptcy notice at this stage an implication of some other collateral purpose. A large degree of blame for the occurrence of this set of events is, in my opinion,
B due to the plaintiff's own doing. Though the stay order was granted on 5 September 1991, it was only about a month later, on 4 October 1991, that the plaintiff paid the sum of RM21,374.70 into court. As the stay was upon condition of this payment, I agree with the defendants' contention that the stay was not effective until this payment; they were, thus, allowed to
C proceed with the service of the bankruptcy notice. On top of this, payment of the money into court was not made known to the defendants. They did not become aware of this until November 1991; by which time, the bankruptcy notice was served. When questioned as to why he did not inform the defendants of his payment into court, the plaintiff replied: 'I do not see the need to inform them as they were present at the hearing (when
D the inter parte stay order was made)'. Though the defendants were present, but the issue is on the time of payment. Without knowledge as to when payment was made, and the plaintiff's determination in not informing the defendants of this, the act of the defendants in serving the bankruptcy notice cannot be considered as a means of obtaining some collateral advantage beyond what the law offers. On the contrary, this particular episode speaks
E poorly of the plaintiff. Instead of avoiding any embarrassment on the service of the bankruptcy notice by informing the defendants of his payment into court he seems purposefully minded to entrap the defendants into the pitfalls of the law. If there is any other purpose for bringing this abuse of process suit other than by lawful process, to my mind, it is found to be on
F the part of the plaintiff rather than the defendants.

Conclusion

By reasons aforesaid, I hereby dismiss the plaintiff's claim with costs.

Claim dismissed.

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Reported by Jafisah Jaafar

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